



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

MDV/170761

PRELIMINARY RECITALS

Pursuant to a petition filed December 14, 2015, under Wis. Stat., §49.45(5), to review a decision by the Marinette County Dept. of Human Services to deny Medical Assistance (MA), a hearing was held on January 20, 2016, by telephone.

The issue for determination is whether a disqualifying divestment occurred when petitioner's husband gave a car to his daughter.

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Atty. [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: [REDACTED]
Marinette County Dept. of Human Services
1605 University Drive
Marinette, WI 54143

ADMINISTRATIVE LAW JUDGE:

Brian C. Schneider
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a 68-year-old resident of Marinette County.
2. Petitioner was determined to be disabled for social security purposes in 2001 due to emphysema. In 2015 her health otherwise was good; she was active with no immediate expectation of needing long term care.
3. On May 12, 2015, petitioner and her husband transferred a 1967 Chevrolet Camaro worth \$9,800 to a daughter.

4. Petitioner suffered a stroke on August 4, 2015 while driving to visit her daughter in Racine. She resides in a nursing home currently. Her husband remains in the community.
5. An application for MA was filed on petitioner's behalf on October 30, 2015, seeking coverage back to August 4. At that time the couple's nonexempt assets totaled \$35,071, below the \$52,000 Spousal Impoverishment asset limit. The county determined that the transfer of the car was a divestment resulting in a 38-day ineligibility period. Nursing home MA was granted effective September 11, 2015. Petitioner was informed about the determination on December 3, 2015.

DISCUSSION

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat., §49.453(2)(a); Wis. Admin. Code, §DHS 103.065(4)(a); MA Handbook, §17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as "MA card services" in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient (\$252.95 in 2015). MA Handbook, §17.5.2.

An exception to the divestment penalty is found in the Wisconsin Administrative Code, §DHS 103.065(4)(d)2.b: "It is shown to the satisfaction of the department that one of the following occurred:...

- b. The resource was transferred exclusively for some purpose other than to become eligible for MA." The MA Handbook notes the exception in §17.4:

A divestment that occurred in the look-back period or any time after does not affect eligibility if any of the following exceptions apply:

1. The person who divested shows that the divestment was not made with the intent of receiving Medicaid.

The person must present evidence that shows the specific purpose and reason for making the transfer, and establish that the resource was transferred for a purpose other than to qualify for Medicaid. Verbal assurances that he or she was not trying to become financially eligible for Medicaid are not sufficient. Take into consideration statements from physicians, insurance agents, insurance documents, and bank records that confirm the person's statements.

Any of the following circumstances are sufficient to establish that the applicant/member transferred resources without an intent to qualify for Medicaid.

- The applicant/member had made arrangements to provide for his or her long term care needs by having sufficient financial resources and/or long term care insurance to pay for long term care services for at least a five-year period at the time of the transfer....
- Taking into consideration the individual's health and age at the time of the transfer, there was no expectation of long-term care services being needed for the next five years. For example, someone who was gainfully employed and 50 years old at the time of the divestment is not expected to have set aside sufficient resources for five years of long-term care, **or**

- If an individual or couple had a pattern of charitable gifting or gifting to family members (i.e., birthdays, graduations, weddings, etc.) prior to the look-back period, similar transfers during the look-back period would not be considered to have been given with the intent to divest as long as the total yearly gifts did not exceed 15 percent of the individual's or couple's annual gross income....
- Resources spent on the current support of dependent relatives living with the individual are not considered to be divestments....

This list is not intended to be all inclusive when describing divestments which are permissible because the transfer was made without the intent to qualify for Medicaid. Other situations will arise and in those instances, the person's "intent" must be evaluated on a case-by-case basis to determine whether or not a divestment occurred. The fact that a person does not meet the criteria for a specific exception does not create a presumption that the person cannot show that the transfer was made for a purpose other than qualification for Medicaid. For example, a person may be able to show that a transfer to a dependent relative not living at home was made for a purpose other than qualifying for Medicaid.

Petitioner argues that the gift was not made with the intent of receiving MA. Petitioner's husband testified that he purchased the car before his marriage to petitioner and refurbished it himself. It was always his plan to pass it on to one of his children, and he transferred it to his daughter just days before her daughter's wedding, as part of the big occasion. Petitioner herself was in good health, was actively involved in travel, social activities, and charitable activities; the couple purchased a pontoon boat in the spring, 2015, which shows that the thought of potential institutionalization was not in their minds.

On the other hand, the county reviewed the situation and noted that petitioner was past retirement age and disabled. It was the county's position that a 67-year-old woman disabled by emphysema would be a candidate for possible breakdown in health over the next five years.

I cited the long Handbook provision because I believe it provides insight into the Department's interpretation of "exclusively" for a purpose other than potential MA eligibility.

Petitioner would have the agency rely solely on her husband's assurance that the transfer was for reasons other than MA. Furthermore, the timing of the transfer was odd. It would be one thing if the transfer was a wedding gift to the married couple, but the transfer was to the bride's mother. Such a transfer could be made any time.

When I go through the examples, none of them fit this transfer. Petitioner did not make provision for her care for the next five years. Although petitioner was relatively young and active, she had a health condition serious enough that she was determined to be disabled, so the possibility of the need for long term care absolutely had to be within consideration. There was no pattern of gift giving, and the transfer was not to a dependent.

It is true that had petitioner's husband simply held onto the car its value along with other assets would have been under the Spousal Impoverishment limit when petitioner's application was filed; if they still owned the car their total assets would have been approximately \$45,000. However, it is unlikely that the couple knew or understood the complex Spousal Impoverishment law when the car was transferred; petitioner's husband did not testify that they considered the higher Spousal Impoverishment asset limit when they transferred the car. The fact that assets would have been under the asset limit most likely is a coincidence.

I believe that the most likely scenario is that petitioner's husband felt a sense of pride about the car, and as he testified, he always intended to give it to his daughter. With neither spouse having any immediate physical vulnerability, it seemed probable that five years could pass without the need for a nursing home. I cannot conclude, however, that the transfer was exclusively for a reason other than potential MA eligibility; it simply is beyond belief that the potential for long term care did not enter into the decision at all.

Petitioner cites a prior decision in which one of my fellow ALJs concluded that transfers by an 86-year-old woman to family members were exclusively for reasons other than potential MA eligibility. Prior fair hearing decisions are not precedential, and frankly, I am a little puzzled how my cohort could come to the conclusion that an 86-year-old would transfer away some \$60,000 in assets (an estimate based upon the proposed ineligibility period described in finding of fact no. 5 in Decision no. MDV-158538) without having potential MA eligibility in mind. A big difference between the two cases is that the recipients in MDV-158538 were in financial straits, which appears to have influenced the ALJs decision; that was not the case here. A perhaps overly generous prior decision should not handcuff agencies or ALJs in future cases.

CONCLUSIONS OF LAW

The county correctly determined that petitioner and her husband divested a \$9,800 vehicle in May, 2015, prior to her MA application.

THEREFORE, it is

ORDERED

That the petition for review is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 26th day of January, 2016

\sBrian C. Schneider
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian Hayes, Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on January 26, 2016.

Marinette County Department of Human Services
Division of Health Care Access and Accountability
Attorney [REDACTED]